LEE KIM YIN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Pretheroe, J. and Spenser-Wilkinson, J.) February 24, 1949]

[F.M. — Criminal Appeal No. 17 of 1949]

Emergency Regulations 1948 Regulation 4(i)(b) — Possession of hand-grenade — Retracted confession — Failure of trial Judge to direct assessors as to truth or otherwise of confession — Whether there was a substantial miscarriage of justice — Courts Ordinance 1948, S. 29(i) — Criminal Procedure Code S. 422.

In this case the appellant had been convicted on a charge of being in possession of one hand grenade without lawful authority. The only evidence before the trial Court as to the possession of the hand-grenade consisted of a statement made by the appellant to the Police Officer in charge of the investigation. This confession was retracted by the appellant at the trial. The learned trial Judge did not sufficiently direct the assessors on the question of the truth or otherwise of the confession.

Held, (1) that the learned trial Judge should have directed the assessors that they should be satisfied of the truth of the confession; (2) that in spite of the misdirection or non-direction as to the truth of the confession in this case, there was no substantial miscarriage of justice, as there was no doubt that on the whole of the evidence and with a correct direction the assessors would have convicted.

Cases referred to :—

(1) *Yap Sow Keong & another v. Public Prosecutor* (1947) M.L.J. 91.

(2) *Harold White v. King* (1945) A.I.R. P.C. 181.

(3) *Rex v. Cohen & Bateman* 2 Cr. App. R. 197.

(4) *Rex v. Haddy* (1944) 1 K.B. 442.

(5) *Stirland v. Director of Public Prosecutions* (1944) A.C. 315.

CRIMINAL APPEAL.

Kitson Khong for the Appellant.

A. M. I. Austin (D. P. P.) for the Respondent.

The judgment of the Court of Appeal was delivered by :—

Spenser-Wilkinson, J. : — The appellant was charged under Regulation 4 (i) (b) of the Emergency Regulations, 1948, with being in possession of one hand-grenade without lawful authority therefor between the 18th October and 1st November, 1948. The only evidence before the trial Court as to the fact in issue — i.e. possession of a hand-grenade — consisted of a statement made by the appellant on the 2nd November, the day of his arrest, to Inspector Chye, the Police Officer in charge of the investigation.

The gist of the story told by the appellant in that statement was that he was unemployed in Kampar when one Wong Cheong said he would find him work; that Wong Cheong having taken him from Kampar to Temoh there handed him over to one Ng Kean Kok who took him through various rubber estates to a camp in the jungle where there were five male Chinese all armed. He stayed in this camp for some time being made to cook for these five men. During the time he was there one of the other Chinese brought hand-grenades to the camp in quantities of 3 or 4 at a time and handed these over to Ng Kean Kok for storage. The appellant was given one hand-grenade complete with fuse and and detonator for self-protection. He also stated that three or four nights before his arrest one of the five men, Kow Sang, told the others in the camp that he wanted to ease himself and, having left the camp for this purpose did not return although a search was made by the others throughout the night. Fearing that Kow Sang might have reported to the police Ng Kean Kok decided that the camp should be broken up and the members thereof dispersed. The appellant accordingly made his way to the rubber estate where he was arrested in the kongsi house by a combined military and police party on the 2nd November, 1948.

The appellant's remarks in his statement regarding Kow Sang are of some importance because this man under the name of Chai Kok Sang gave evidence for the prosecution which, to a large extent, corroborated the main lines of the appellant's story. This witness stated that he had been in a hut in the jungle with five other Chinese, of whom the appellant was one, that he (the witness) had been the cook and that he had escaped from the hut by pretending that he wished to go out to ease himself. Evidence was given that this man led a combined police and military party to a hut in the jungle where he said he had been with the appellant; and he subsequently identified the appellant in the kongsi house where he was arrested about three quarters of an hour's walk from the hut in the jungle.

The appellant gave evidence on his own behalf at the trial. The story he told from the witness box was substantially different from that given in his statement. He denied having said to the inspector what appeared in the statement and he specifically retracted the vital words of confession "I was given one hand-grenade for self-protection. The hand-grenade was complete with fuse and detonator." This was a case, therefore, in which the sole evidence in support of the charge was a retracted confession. The law regarding such cases has already been laid down by the Court of Appeal in *Yap Sow Keong & Anor. v. Public Prosecutor*[1].

The following passages from the judgment in that case are relevant to the present appeal :—

> In our view the law as to the admissibility of retracted confessions in evidence is clear, and put shortly it is that an accused person can be convicted on his own confession, even when it is retracted, if the Court is satisfied of its truth.
>
> We wish it to be known that when a person has been in police custody and the only evidence tendered against him at his trial is a confession, which is retracted, it is the duty of the Court to enquire into the matter with great care and satisfy itself that the confession has not been made by any inducement, threat or promise made by the police.

The important words in the first of these passages are "if the Court is satisfied of its truth" reinforced as they are by the following remarks in the judgment of the Privy Council in *Harold White v. King*[2] :—

> The jury should have been cautioned that confessions are not always true and that they must be checked more particularly in a murder case in the light of the whole of the evidence on the record in order to see if they carry conviction.

Although the facts in the last cited case were very different from those in the present case, we are of opinion that in all cases of a retracted confession the jury or assessors, as the case may be, should always have their minds directed to the consideration whether the confession made by the accused was in fact true.

In the present case the learned trial Judge did not, in our view, sufficiently direct the minds of the assessors to this point. The following passages appear in the course of the summing up :—

> That statement — if you believe that the accused made that statement — is in some way corroboration of Chai Kok Sang's statement.....
>
> If you believe that that statement was recorded as Inspector Chye said it was, well, then there can be no doubt that he was in possession of a hand-grenade.....
>
> If you have any doubt as to whether the accused made that statement or not.....
>
> The whole case against the accused rests on the accused's statement.....and whether in fact the accused made that admission or not.....

It will be seen that all these passages direct the minds of the assessors to the question whether or not the accused ever made the statement. None of the passages referred to suggests the question "Was the statement made by the accused true?". The only passage in the summing up which might be read as suggesting this question is as follows :—

> But in weighing the evidence of that statement, you must consider the probabilities of the case and you must consider the circumstances in which the accused said this statement was taken.....

And this is immediately followed by the words :—

> And you must also consider the evidence of Inspector Chye who said he took the statement.

thus bringing the assessors back again to the question whether the statement was made or not.

Whilst we are of opinion that the evidence given and the questions asked in this case were sufficient to satisfy the requirements of the second passage above cited from *Yap Sow Keong's* case and are, therefore, quite satisfied that the appellant's statement was properly admitted, we are of opinion that there was no sufficient direction to the assessors on the question of the truth or otherwise of the confession.

One other point regarding the summing up must be mentioned. In discussing whether there was corroboration of the evidence of the 4th prosecution witness the learned trial Judge after making the statement first above quoted goes on as follows :—

> It is in some way corroboration of Chai Kok Sang's statement because in it he mentions Kok Sang and he said he left the camp because he wants to ease himself.

But in fact the name of Kok Sang does not appear in the appellant's statement whilst the name Kow Sang appears in two places. In the Hakka dialect "Kok" and "Kow" are not the same name. This was clearly a slip on the part of the learned trial Judge and we would make the following comments thereon. In the first place, the evidence of the 4th prosecution witness was of little importance to the prosecution case. No doubt the prosecution was right to call him but the evidence did little to advance their case except in so far as it tended to establish the general truth of the story told by the appellant in his statement. Secondly this remark of the learned trial Judge was directed rather to the similarity of the accounts given by the witness and the appellant as to the witness's method of escape than to the question of names. We do not think that this slip on the part of the learned trial Judge could have any effect on the minds of the assessors in regard to the main evidence against the accused which was his own confession together with the evidence of opportunity given by the first and second prosecution witnesses.

It remains to consider what effect, if any, the misdirection or non-direction as to the truth of the confession should have in regard to this appeal. This depends upon whether or not the proviso to section 29 (i) of the Courts Ordinance, 1948 should be applied. This proviso reads as follows :—

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

In so far as this proviso may be inconsistent with or conflict with section 422 of the Criminal Procedure Code it is the proviso which must prevail by virtue of section 109 of the Ordinance. This proviso is very

nearly identical with the proviso to sub-section (i) of section 4 of the Criminal Appeal Act, 1907 which reads as follows :—

> Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

The meaning of the expression "substantial miscarriage of justice" in the English proviso was considered by the Court of Criminal Appeal in the case of *Rex v. Cohen & Bateman*[3]. In that case Channel, J. in delivering the judgment of the Court said :—

> There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso.

In the case of *Rex v. Haddy*[4] the Court of Criminal Appeal after quoting the above passage said :—

> That statement of the law has stood for 35 years and so far as we are aware has never been the subject of adverse comment.

The decision in *Rex v. Haddy* was approved by the House of Lords as a correct interpretation of sub-section 4 (i) of the Criminal Appeal Act in *Stirland v. Director of Public Prosecutions*[5]. The following is the relevant passage from the opinion of Lord Simon in the latter case :—

> A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.

Although the appellant in this case retracted his statement at the trial we are satisfied, not only that his confession was in fact true, but also that had the assessors checked that confession in the light of all the evidence before them they would, as reasonable men, have come to the conclusion that it was true. Applying the law as we have stated it to this appeal we have no doubt that on the whole of the evidence and with the correct direction the assessors would without doubt have convicted.

Appeal Dismissed.

POON HEONG v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Pretheroe, J. and Spenser-Wilkinson, J.) March 18, 1949]

[F.M. — Criminal Appeal No. 24 of 1949]

Emergency Regulations 1948, Regulations 4(1)(b) and 33 — Form of caution to be used before taking a statement — Whether failure to follow form of caution gives rise to substantial miscarriage of justice — Courts Ordinance 1948 S. 29(1).

In this case the appellant was convicted on a charge of being in possession of explosives. At the trial a statement made by the appellant to the Police after his arrest was admitted in evidence. It appeared that the caution used by the Police officer in this case was "You are not obliged to say anything, but anything you say may be given in evidence at your trial" instead of the proper form of caution "It is my duty to warn you that you are not obliged to say anything, or to answer any question, but anything you say whether in answer to a question or not, may be given in evidence at your trial".

Held, (1) that as the appellant had not been properly cautioned, the statement should not have been admitted in evidence at the trial; (2) that as in this case it was clear that no reasonable Assessors, after a proper summing up, and on the rest of the evidence, could have failed to have come to the conclusion that the appellant was guilty of the offence charged, there was no substantial miscarriage of justice and the appeal must be dismissed.

Cases referred to :—

(1) *Cheng Seng Hong & others v. Public Prosecutor* (1949) M.L.J. 67.

(2) *Public Prosecutor v. Lee Weng.* Raub Criminal Trial No. 3 of 1949 (unreported).

(3) *R. v. Baldry* (1852) 21 L.J.M.C. 130.

CRIMINAL APPEAL.

P. J. D. Regester for the Appellant.

A. M. I. Austin (D. P. P.) for the Respondent.

The judgment of the Court of Appeal was delivered by :—

Willan, C. J. : — The appellant was charged with being in possession of explosives, namely two detonators, one fuse and about 2 ounces of gun cotton at the 23rd mile on the Manchis Road in the State of Pahang, on or about the 20th January, 1949, an offence contrary to Regulation 4(1)(b) of the Emergency Regulations, 1948. He was convicted and sentenced to death.

At the trial the prosecution tendered in evidence a statement made by the appellant to the police after